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No. 82-33

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE HELEN MINING COMPANY, and
KENTLAND-ELKHORN COAL CORPORATION,
Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR,
and
UNITED MINE WORKERS OF AMERICA,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT UNITED MINE WORKERS OF AMERICA

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QUESTION PRESENTED

1. Whether the Court of Appeals correctly determined that section 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(f), grants miners the right to accompany a federal inspector, without loss of pay, not only during the routine inspections of the entire mine, but also during the spot inspections, conducted at frequent intervals at particularly dangerous mines, and in response to a miner's report that a violation or imminent danger exists.

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BRIEF IN OPPOSITION FOR RESPONDENT UNITED MINE WORKERS OF AMERICA

The respondent United Mine Workers of America respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the District of Columbia Circuit's opinion in this case. The Court's opinion is titled *United Mine Workers of America* v. *Federal Mine Safety and Health Review Commission* and is reported at 671 F.2d 615. The opinion was included as Appendix A to the petition for writ of certiorari.

STATEMENT OF THE CASE

This case involves the proper statutory construction of section 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(f), (Supp. IV 1980) (hereinafter "the Act"). That statutory provision affords miners, or their representatives, the right to participate in certain inspections conducted by the Mine Safety and Health Administration (MSHA) and provides further that miners will suffer no loss of pay as a result of exercising that right. This statutory right is commonly known as the "walkaround right." The issue in this case is whether the walkaround right applies to only one type of inspection conducted under the Act or whether it applies to a broad range of inspection activity conducted by the Secretary of Labor pursuant to his enforcement responsibilities under the Act.

A miner's walkaround right under section 103(f) arises in connection with inspections "made pursuant to the provisions of subsection (a)." Section 103(a) of the Act (30 U.S.C. § 813(a), Supp. IV 1980) is a broad authorizing provision which mandates, among other things, that the Secretary of Labor conduct "frequent inspections" for the purpose of determining "whether an imminent danger exists" and "whether there is compliance with the mandatory health or safety standards." To enable the Secretary to carry out his inspection duties, section 103(a) grants the "right of entry to, upon, or through any coal or other mine," and prohibits advance notice of inspections. Section 103(a) also requires that underground mines be inspected in their entirety at least four times a year, and surface mines at least twice a year. These routine inspections of the entire mine are commonly known as "regular" inspections.

In addition to these regular inspections of the entire mine, the Secretary conducts frequent spot inspections. Such spot inspections may cover all or part of a mine and may focus on one or more types of hazards such as electrical, roof control, ventilation, or health problems. Under section 103(i), 30 U.S.C. § 813(i) (Supp. IV 1980), such spot inspections are required to be conducted with a certain frequency at a mine which liberates excessive amounts of methane or contains some other especially hazardous condition. A spot inspection is also triggered by a miner's complaint of a violation or dangerous condition under section 103(g) of the Act (30 U.S.C. § 813(g) Supp. IV 1980).

On April 25, 1978, the Secretary of Labor published an Interpretive Bulletin explaining how he intended to enforce the miners' walkaround right under section 103(f) of the Act (43 Fed. Reg. 17,546-49). The Interpretive Bulletin stated that, under section 103(f), "protection against loss of pay during participation in inspections is as broad as the participation right itself." (*Id.* at 17,548-49). The Secretary concluded that miners would be entitled to accompany inspectors, with no loss of pay, not only on the regular inspections, but on spot and miner-requested inspections, as well. Since each of these inspections are conducted for one of the purposes enumerated in section 103(a), the Secretary concluded that such inspections are "made pursuant to the provisions of subsection (a)." *Id.* at 17,547-48. The Secretary concluded that the miner's presence on such occasions would be particularly useful in aiding the inspection (*Id.* at 17,549).

Each of the three cases consolidated for review before the District of Columbia Circuit arose when the operator refused to compensate the miners' representative for time spent accompanying the federal inspector on various

spot inspections. In each case, the Secretary took appropriate enforcement action in accordance with his interpretive bulletin.[1] The operators challenged the Secretary's actions in proceedings before the Federal Mine Safety and Health Review Commission. There, the operators argued that the only inspections made "pursuant to the provisions of subsection (a)" were the regular inspections of the entire mine. Since the inspections in question did not come under that category, the operators contended that no violation of section 103(f) had occurred.

The Federal Mine Safety and Health Review Commission issued a decision which distinguished between the miner's right to accompany the federal inspector and the right to be paid for such activity. The Commission determined that, while the right to accompany inspectors applied to both the regular and spot inspections, the operator was required to compensate the miner only on the regular inspections. In reaching its decision, the Commission relied solely on remarks made by Congressman Perkins before the House passage of the 1977 Act. The Commission found the remarks to be "dispositive" of the question of how Congress intended section 103(f) to be ap-

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[1] Kentland-Elkhorn Coal Corporation and Helen Mining Company were issued citations and withdrawal orders and assessed a civil penalty for violating section 103(f) of the Act. This enforcement activity is authorized by sections 104(a) and (b) and section 110(a) of the Act, 30 U.S.C. §§ 814(a) and (b), and § 820 (Supp. IV 1980).

Allied Chemical Corporation was issued a complaint, charging it with interference with the exercise of the statutory rights of the representative of the miners, in violation of section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1) (Supp. IV 1980).

plied. (P. 60a).[2] The Court of Appeals reversed, finding the Commission's construction to be contrary to the unambiguous language of section 103(f). The Court held that the miners' right to be compensated under section 103(f) was clearly coextensive with their right to participate in the inspection, and that such participation right extended to spot inspections and inspections conducted in response to a miner's request.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT RAISE THE QUESTIONS PRESENTED IN THE PETITION

A. The Decision Below Is Clearly Correct And Was Decided In Accordance With This Court's Directions Regarding Statutory Construction

Petitioners urge review on the grounds that the Court of Appeals ignored "clear, authoritative, and dispositive legislative history in the face of an ambiguous statute." (P. iii). What the Court of Appeals actually did, however, was refuse to construe the statute in a manner contrary to its plain language, solely on the basis of a statement by a single member of Congress. While recognizing the appropriateness of resorting to legislative history when the words of a statute are ambiguous, the Court of Appeals observed that, "It is equally well-settled that, before resorting to legislative history, a court or administrative body should first look to the language of the law itself to determine its meaning," citing *Consumer Product Safety Commission* v. *GTE, Sylvania, Inc.*, 447 U.S.

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[2] "P" is used herein to refer to the certiorari petition and the appendix to it.

102, 108 (1980); and *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979). (P. 12a-13a).

> Section 103(f) provides that:
>
> [miner representatives may accompany federal inspectors] during the physical inspection of any . . . mine made pursuant to the provisions of subsection (a) . . . . Such representative of miners . . . shall suffer no loss of pay during the period of his participation in the inspection made under this subsection.

Given the fact that the right to compensation is defined by precisely the same reference as the right to participate in the inspection, the Court of Appeals correctly concluded that, under section 103(f), the two are coextensive and that there was "simply no basis for reading it as supporting the bifurcation of participation and compensation rights espoused in the Commission's decisions." The unambiguous nature of the coextensiveness question contained "so plain a mandate" that the Court concluded that "whenever miner representatives have the right to accompany an inspector, they also have the right to be paid." (P. 14a n. 21).[3]

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[3] Petitioners attempt to characterize the Commission's bifurcation of the walkaround right as irrelevant, claiming the right of a miner to accompany inspectors without pay on spot inspections is "unlikely ever to arise because the wage agreement between the miners and mine operators provides for a walkaround right on all inspections." (P. 15 n. 18). This assertion is surprising for two reasons: First, the wage agreement contains no such explicit walkaround right (even if it did, there is no way of knowing whether the Union would be able to retain such right in future agreements). Secondly, the assertion represents a most cavalier attitude toward the rights of the many thousands of miners who are not under a wage agreement, and who must rely solely on the terms of the statute for any right to participate in inspections.

Petitioners contend that the Court erred by not construing section 103(f) in accordance with the statement of Representative Carl Perkins. The Congressman's statement indicated that it was the intent of the Conference Committee to permit miners to accompany inspectors on all inspections conducted by federal inspectors, but to require payment only on the regular inspections of the entire mine. Petitioners assert that the court "failed to consider Representative Perkins' remarks *at all.*" (P. 10). In fact, the Court did consider the Congressman's statement but, for several reasons, concluded that, "it could hardly be said to reflect the unambiguous intent of the Congress." (P. 15a).

The Court observed that the statement was made three weeks after the Senate had completed its consideration of the Conference Report and had voted passage of the bill. Given the fact that the statement conflicts with a plain requirement of the statute, the Court found it significant that there was no indication that "Congressman Perkins' gloss on section 103(f) was ever brought to the attention of or approved by the Senate." (P. 15a n. 23). The Court observed further that the Conference Report itself "does not explicitly or by inference, mention the agreement attested to by Congressman Perkins . . . ." (P. 16a). Indeed, the Court found, the report conveyed "the quite contrary impression that the broad walkaround pay rights granted by the Senate bill remained unaffected by the changes made by the conference." (*Id.*) Considering these facts, the Court concluded that the statement of the Congressman did not justify construing the statute in a manner contrary to its plain terms. The Commission's

decisions, which were wholly dependent upon the statement, could, therefore, not be upheld.[4]

It is obvious, therefore, that Congressman Perkins' remarks do not provide those "rare and exceptional circumstances" which justify a court extending its inquiry beyond the plain language of the statute. *Howe* v. *Smith*, 452 U.S. 480, 483 (1981). The decision below does not depart from the directions of this Court. The cases relied on by petitioner involved evidence of contrary congressional intent of an entirely different nature than the legislative history relied upon by petitioners in this case. In *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1 (1976), this Court concluded that materials regulated by the Atomic Energy Act were excluded from the definition of pollutant contained in the Federal Water Pollution Control Act. In so holding, however, this Court found that the legislative history of the Water Pollution Control Act spoke "with force" on the question of statutory construction before it. The House Committee Report was "quite explicit" concerning their intention to exclude such materials, and many legislators had indicated their reliance on such report. This Court found, further, that to include such materials under the coverage of that Act would be to take a position that had been contained in an amendment expressly defeated by Congress. *Train*, *supra* at 11-12, 21-22.

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[4] Petitioners stress the important role that Congressman Perkins, as sponsor and chief House conferee, played in the passage of the Act. As this Court has held, however,: "Ordinarily, even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." *Consumer Product Safety Commission*, *supra* at 118.

In *Watt* v. *Alaska*, 451 U.S. 259 (1981), this Court construed the term "minerals" in the National Wildlife Refuge Act as applying only to minerals contained in acquired (as opposed to existing) refuge lands. To have applied a literal interpretation of the term, however, would have required a determination that Congress had repealed a provision of another statute, by implication, an approach not favored by this Court.[5]

Having determined that Congressman Perkins' remarks did not justify a departure from the plain language of the statute and that such language made the right to payment as broad as the right to participate in inspections, the Court turned its attention to determining the scope of that participation right. The participation right arises during inspections conducted "pursuant to the provisions of subsection (a) [of section 103]." Concluding that

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[5] The other cases relied on by petitioner are equally unsupportive, since none of them construe a statute contrary to its plain terms. In *Woelke & Romero Framing, Inc.* v. *NLRB*, 50 U.S.L.W. 4538, 4544 (1982), the interpretation urged by the NLRB, unlike that of the Commission, was found to be supported by the statute's "plain language as well as its legislative history." In *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, *supra* at 109, this Court held that a disclosure pursuant to a Freedom of Information Act Request was a public disclosure "within the plain meaning of section 6(b)(1) of the Consumer Product Safety Act."

In *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, 443, 449 (1955), this court held that section 301 of the Labor Management Relations Act was a mere procedural provision directing the federal courts to treat a labor union as though it were a natural or corporate legal person. Such holding was found to be the result of giving the statutory provision "the meaning its language spontaneously yields" and the legislative history was found to reinforce "the meaning conveyed by the statute itself . . . ."

this section of 103(f) "was not wholly unambiguous," the Court conducted a thorough analysis of the language and the legislative history of sections 103(a) and 103(f) (P. 18a).

The Court found that the regular inspections were not the only ones mandated by section 103(a), since that provision directs the Secretary to conduct "frequent [other] inspections" for the purpose of determining "whether an imminent danger exists" and whether "there is compliance with the mandatory health or safety standards." (*Id.*) Observing that the right of the Department of Labor to enter the mines without a warrant flowed solely from subsection (a), and that the prohibition against advance notice contained in that subsection applied to the inspections in this case, the Court determined that the basic authority for the inspections at issue in this case rests in subsection 103(a). Noting that the statutory language at issue in this case was adopted from the Senate version of the Act, the Court found the Senate Report fortified its conclusion that spot and miner-requested inspections are conducted pursuant to subsection (a).

In rejecting a construction which would limit the miners' walkaround right, the Court kept in mind "the broad health and safety purpose underlying the Act, in general, and the miners' walkaround rights, in particular . . . ." (P. 25a). The Court concluded that there was,

> no reasonable basis for concluding that Congress intended to grant broad walkaround rights to miner representatives for routine inspections but to deny

such rights with respect to inspections conducted to deal with specific safety hazards. (P. 23a)[6]

Since the inspections giving rise to these proceedings were ones in which a miner had the right to accompany the inspector without loss of pay, the Court reversed the Commission's decisions and remanded for further proceedings consistent with the Court's decision.

B. There Is No Conflict Of Decisions

Petitioners argue that, by failing to give any weight to the Commission's decision, the Court of Appeals' decision conflicts with those of the Fourth, Sixth, and Eighth Circuits. In support of this contention, petitioner cites cases in which these Circuits have accorded deference to decisions of the Occupational Safety and Health Review Commission. The cases relied on by petitioner are inapplicable to the instant proceeding. With one exception, none of the cases cited by petitioner involve an agency decision that was contrary to the terms of the statute, as was the decision of the Mine Safety and Health Review Commission below. In the one case cited by petitioner in which the agency did deviate from the statute, the court did not defer to the agency, but applied the terms of the statute.[7]

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[6] The Court noted the paradoxical nature of limiting a miner's walkaround right to the routine regular inspections. Under such a holding, a miner who requests a special inspection would not be paid to personally accompany the inspector to show the condition or explain why it is dangerous. Miners would be denied the right to payment on spot methane inspections, although a principal impetus for enactment of the 1977 statute was the Scotia Mine disaster in which several miners and federal inspectors were killed as a result of two explosions of accumulated methane gas.

[7] *Usery* v. *Hermitage Concrete Pipe Co.*, 584 F.2d 127, 131 (6th Cir. 1978).

In the other cases relied on by petitioner, the courts determined either that the agency was "effecting the plain meaning of the statute,"[8] or addressing a question (employer liability on a multiemployer worksite) that "the statute itself does not answer."[9]

Petitioners argue that the Court of Appeals erred by not deferring to the Commission; yet, they ignore the fact that the Secretary of Labor's interpretation of the law and regulations is also entitled to deference by the Courts of Appeals.[10] The Court of Appeals found that the Secretary's interpretation of section 103(f) was the only one that "avoids outright conflict with the plain terms of the statute and conforms to the health and safety purpose underlying the Act . . ." and was therefore "the one to be preferred." (P. 25a n. 43).

Implicitly recognizing that the Commission's narrow construction of section 103(f) conflicts with the broad health and safety purposes underlying the Act, petitioners speculate as to various reasons why Congress might have wanted to compensate miners only on the regular inspection (P. 19). Petitioners strive to distinguish between the regular inspections and spot inspections and

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[8] *Dunlop* v. *Rockwell International*, 540 F.2d 1283, 1288 (6th Cir. 1976).

[9] *Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d 1255, 1260 (4th Cir. 1974). *See also Marshall* v. *Knutson Construction Co.*, 566 F.2d 596 (8th Cir. 1977); *Bratton Corp.* v. *Occupational Safety and Health Review Commission*, 590 F.2d 273 (8th Cir. 1979).

[10] *See* S. Rep. 95-181, 95th Cong., 1st Sess., at 49 (1977), *reprinted* in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 637 (1978).

assert, without support, that the miner's assistance is unnecessary on the spot inspections. None of these alleged distinctions were relied on by the Commission, however.

As the Court of Appeals noted, the Scotia tragedy was a primary impetus to the passage of the 1977 Act. The report on that disaster prepared by the Staff of the House Committee on Education and Labor noted the inherent limitations upon the ability of the inspectors to conduct an adequate spot inspection when they are working alone:

> By definition, spot inspections are very limited in both scope and time. When conducting such inspections, MESA inspectors usually look for a specific mine condition and have only a few hours in which to complete the work. The result, unfortunately, is that an inspector very often will miss hazardous conditions which exist independent of those he is checking for, and also, his expertise may not be appropriate for recognizing other hazards . . . . (STAFF OF HOUSE COMM. ON EDUCATION AND LABOR, SUBCOMM. ON LABOR STANDARDS, (94th Cong., 2d Sess., SCOTIA COAL MINE DISASTER 27 (Comm. Print 1976)).

The Court of Appeals was correct when it concluded that there was simply no basis for concluding that Congress intended to limit a miner's ability to participate in the spot inspections. Indeed, the Commission did not even attempt to supply reasons which would support such a conclusion, but merely relied on Congressman Perkins' remarks as dispositive. The Court correctly determined that such an approach, contrary to both the language and purpose of the statute was not entitled to deference.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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